STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 14, 2013
v	No. 309876 Kent Circuit Court
MARCUS DWANE MANNING, JR., Defendant-Appellant.	LC No. 11-009886-FH

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant of two counts of transporting a female for prostitution, MCL 750.459,[1] and the trial court sentenced defendant as a fourth-offense offender, MCL 769.12, to concurrent prison terms of 15 to 40 years for each conviction. The trial court also sentenced defendant to 163 days in jail for his guilty plea conviction of possession of marijuana, MCL 333.7403(2)(d). Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred by denying defendant's motion to suppress evidence obtained as the result of a search of his hotel room at the Gatehouse Suites. We review for clear error a trial court's findings of fact in a suppression hearing, but review de novo its ultimate decision on a motion to suppress. *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009). Whether to hold an evidentiary hearing based upon a challenge to the validity of a search warrant's affidavit is committed to the discretion of the trial court. *People v Martin*, 271 Mich App 280, 309; 721 NW2d 815 (2006). "However, this Court reviews the facts supporting the denial of the evidentiary hearing for clear error and the reviews the application of those facts to the law de novo." *Id.*

Defendant filed a motion for a *Franks*[2] evidentiary hearing and to suppress the evidence obtained during the search of room 224 of the Gatehouse Suites, arguing that the search warrant was invalid because it was based on false information. Defendant alleged that the search warrant affidavit falsely stated that Marcellus Manning rented room 143 at the Howard Johnson Plaza

[1] The jury acquitted defendant of one count of human trafficking, MCL 750.462(2)(b).

[2] *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

and room 224 at the Gatehouse Suites,[3] and that a photograph attached to the search warrant affidavit and purporting to be Rogers, one of the prostitutes in this matter, was "pulled off the internet" and not identified as Rogers by any family member. Defendant argued that after removing all of the tainted allegations in the affidavit the remaining allegations were insufficient to support a finding of probable cause to search room 224 and, therefore, the resulting search warrant was invalid.

The trial court denied defendant's motion to suppress. After a hearing, the trial court denied the request for a *Franks* hearing. First, the court concluded that defendant failed to present any authority requiring the police to have a family member identify a photograph in order to confirm the identity of the person in the photograph. Second, with regard to the identification of the person who rented the relevant hotel rooms as "Marcellus Manning" rather than "Marcus Manning" in the affidavit, the trial court adopted the prosecutor's analysis:

> The defendant's main argument is that "Marcellus" Manning didn't rent rooms, that only he, "Marcus" Manning, rented a room. This is de minimus. The defendant concedes he was the only Manning rending [sic] a room at the Gatehouse Suites. He concedes that he was rending [sic] room 224. He does not attack the conclusion that "Marcellus" Manning rented at least one room at Howard Johnson's and that this "Marcellus" Manning and a female companion were kicked out of the Howard Johnson's. He does not contest that Detective Beckman spoke with an "Ashley" who offered a "Massage" (a thinly veiled reference to prostitution) at a room at the Gatehouse Suites. It is hardly a leap of imagination to conclude that the room rented by a "Manning" at the Gatehouse Suites was being used for purposes of prostitution, and that there was probable cause to issue a search warrant for the room. That the search warrant affidavit used the first name "Marcellus" instead of Marcus is, in the context of the entire affidavit for the search warrant, picayune, and provides no reason for this Court to order a *Franks* evidentiary hearing on the validity of the warrant.

Probable cause to search must exist at the time that a search warrant is issued. *People v Stumpf*, 196 Mich App 218, 227; 492 NW2d 795 (1992). "Probable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct could be found in a stated place to be searched." *Id.* When reviewing a decision to issue a search warrant, the reviewing court must read the search warrant and the underlying affidavit in a common-sense and realistic manner. *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). Deference is afforded the magistrate's decision because of the preference for searches conducted pursuant to warrants. *Id*. at 604. Such deference simply requires that a reviewing court insure that there is a substantial basis for the magistrate's determination that there exists a fair probability that contraband or evidence of a crime will be found in a particular place before issuing the warrant. *Id.*

[3] Defendant does not dispute that he was the registered guest in these rooms at the respective hotels.

False statements may not be used to support a finding of probable cause. As explained in *Stumpf*, 196 Mich App at 224, *Franks*, 438 US at 154,

> requires that if false statements are made in an affidavit in support of a search warrant, evidence obtained pursuant to the warrant must be suppressed if the false information was necessary to a finding of probable cause. In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause.

If an affidavit contains false information, the search warrant may nevertheless be valid and evidence obtained pursuant to the warrant need not be suppressed if probable cause exists without considering the misinformation. *People v Griffin*, 235 Mich App 27, 42; 597 NW2d 176 (1999), overruled on other grounds *People v Thompson*, 477 Mich 146, 148; 730 NW2d 708 (2007). A trial court is obligated to conduct a *Franks* hearing only if the defendant makes a preliminary showing that the affiant knowingly and intentionally, or with reckless disregard for the truth, included a false statement in the warrant affidavit and that the allegedly false statement was necessary to a finding of probable cause. *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008).

Here, the inaccuracy in the search warrant was the use of the name "Marcellus" Manning instead of "Marcus" Manning. The deletion of the name "Marcellus," leaves the last name "Manning." Even removing the references to the first name and to the photo, the untainted information in the affidavit contained ample evidence that a man with the last name of Manning was renting a room from which runaway Rogers was working as a prostitute and that the persons involved were currently in room 224 of the Gatehouse Suites. These facts provided a substantial basis for the magistrate's conclusion that there was a fair probability that evidence of a crime would be found in the hotel room. Thus, the trial court did not err by denying defendant's motion to suppress. Further, because the first name of the defendant was not necessary to a finding of probable cause, the trial court did not err by denying defendant's request for an evidentiary hearing to determine the veracity of the information.

Defendant next argues that he was denied a fair trial by the admission of hearsay statements from the preliminary examination transcript of a witness who was available for trial. We review a trial court's determination whether to admit the preliminary examination testimony for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

The prosecution may use preliminary examination testimony "whenever the witness giving such testimony cannot, for any reason, be produced at the trial . . . ." MCL 768.26. MRE 804(b)(1) provides the following exception for an unavailable witness's prior testimony:

> Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

MRE 804(a)(5) requires a showing that the proponent of the evidence exercised due diligence in attempting to procure the missing witness's attendance. *Bean*, 457 Mich at 683-684. The test for due diligence is whether the prosecutor made "a diligent good-faith effort in its attempt to locate a witness for trial. The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Id.* at 684.

Here, the trial court conducted a hearing to determine whether the witness was unavailable. Defense counsel indicated that a full evidentiary hearing was not necessary, and that questioning the prosecutor regarding efforts to produce the witness would be sufficient. Trial was scheduled to commence on February 6, 2012. The prosecutor indicated that a subpoena had been sent to the witness by certified mail and was received by her on January 20, 2012. Someone from the prosecutor's Victim/Witness office was in contact with her. The witness first indicated that she would appear, but later indicated that she would not. On January 23, 2012, the prosecutor's office obtained an interstate detainer for the witness. A district attorney obtained personal service on the witness on January 30, 2012. The witness did not appear at a February 3 hearing. Immediately afterward, the prosecutor sent a material witness warrant to the district attorney in Florida, but the witness could not be located.

The trial court determined that the witness was unavailable and that reasonable efforts had been made to secure her presence at trial. The court allowed the prosecution to introduce into evidence the witness's preliminary examination testimony.

Defendant does not argue that the prosecutor failed to make a diligent good-faith effort to produce the witness. Indeed, the proofs established that the prosecutor exercised due diligence in attempting to secure the witness's presence at trial. Rather, defendant argues that the prosecutor failed to establish what *additional efforts* were made to locate the witness when she "'disappeared' a few days before the trial." He speculates that the prosecutor was not "in any position to show at an evidentiary hearing what efforts had been made." However, as previously noted, defense counsel indicated that an evidentiary hearing was not necessary. Thus, any argument related to the lack of an evidentiary hearing is waived.[4] Further, the question is whether good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it. And, it is apparent from the record that the prosecutor had information from Florida authorities that they were actively seeking her and that she was avoiding authorities. Defendant's argument is without merit.[5]

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[4] Defendant does not argue that his counsel was ineffective for failing to request an evidentiary hearing.

[5] Although defendant generally cites authority regarding the right of confrontation, defendant does not argue that he was denied the right to confront the witness as a result of the admission of her preliminary examination testimony. Nonetheless, the transcript of the preliminary examination reveals that defense counsel had an opportunity and similar motive to cross-examine the witness at that time. MRE 804(b)(1); *People v Farquharson*, 274 Mich App 268, 272, 275; 731 NW2d 797 (2007).

Next, defendant contends that MCL 750.459 is unconstitutionally vague on its face and as applied to defendant. Because defendant did not argue in the trial court that MCL 750.459 was unconstitutionally vague, he failed to preserve this claim for appellate review. Normally, unpreserved constitutional claims are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764, 774, 597 NW2d 130 (1999). This Court may, however, overlook preservation requirements with respect to a challenge to the constitutionality of a criminal statute. *People v Noble*, 238 Mich App 647, 651; 608 NW2d 123 (1999). This Court reviews de novo whether a statute is constitutional under the void-for-vagueness doctrine. *Id.* "Statutes and ordinances are presumed to be constitutional and are so construed unless their unconstitutionality is clearly apparent." *Id.* The party challenging the statute has the burden of proving its unconstitutionality. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009).

The void-for-vagueness doctrine flows from the Due Process Clauses of the Fourteenth Amendment and Const 1963, art 1, § 17, which guarantee that the state may not deprive a person of life, liberty, or property, without due process of law. *People v Roberts*, 292 Mich App 492, 497; 808 NW2d 290 (2011). A statute may be challenged as unconstitutionally vague when (1) it is overbroad and impinges on First Amendment freedoms; (2) it does not provide fair notice of the conduct proscribed, or (3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated. *Noble*, 238 Mich App at 651. A statute provides fair notice when it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *Id.* at 652; *Roberts*, 292 Mich App at 497. "A statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *Noble*, 238 Mich App at 652. But "[a] term that requires persons of ordinary intelligence to speculate about its meaning and differ on its application may not be used." *People v Hrlic*, 277 Mich App 260, 263; 744 NW2d 221 (2007).

MCL 750.459 provides in pertinent part:

> Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, by any means of conveyance, into, through or across this state, any female person for the purpose of prostitution or with the intent and purpose to induce, entice or compel such female person to become a prostitute shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 20 years.

Defendant argues that the statute is unconstitutionally vague and overbroad. However, constitutional challenges on the basis of vagueness, other than those based on First Amendment rights, must be examined in light of the case's particular facts. *People v Gilliam*, 108 Mich App 695; 310 NW2d 843 (1981). Furthermore, for defendant to have standing to challenge the statute on overbreadth the statute must be "overbroad in relation to defendant's conduct. One may not

constitutionally challenge a statute on grounds of overbreadth against him when the statute clearly applies." *People v Burton*, 87 Mich App 598, 601; 274 NW2d 849 (1978).[6]

Here, defendant's conduct clearly fits within the statute. A person violates MCL 750.459 if the person knowingly transports a female and the object of the trip is for the purpose of prostitution. See *People v Green*, 123 Mich App 563, 568; 332 NW2d 610 (1983). In this case, defendant set up a webpage advertising the women's services and either transported or caused them to be transported to and from "dates" and to and from the hotels when they moved locations. The evidence demonstrated that defendant knew the women were involved in prostitution and transported them to and from their dates and received proceeds from their acts of prostitution. Testimony indicated that defendant intentionally arranged for the women to be transported into Michigan and that he transported the women to various locations in Michigan to engage in prostitution. Whatever else the statute may or may not cover, it applies here. As such, defendant has no standing to argue either constitutional issue.[7]

Defendant also asserts that MCL 750.459 is preempted by 18 USC 2421 (the "Mann Act") when the prosecution alleges that a person knowingly transports any individual in interstate commerce with the intent that such individual engage in prostitution. He maintains that because the prosecutor asserted that defendant transported the women from Florida, the federal statute applies. Whether federal law preempts state law is a legal question that is reviewed de novo on appeal. *People v Kanaan*, 278 Mich App 594, 601; 751 NW2d 57 (2008).

There are three types of federal preemption: express preemption, conflict preemption, and field preemption. Express preemption occurs when a federal statute clearly states an intent to preempt state law or that intent is implied in a federal law's purpose and structure. Under conflict preemption, a federal law preempts state law to the extent that the state law directly conflicts with federal law or with the purposes and objectives of Congress. Field preemption acts to preempt state law when federal law so thoroughly occupies a legislative field that it is reasonable to infer that Congress did not intend for states to supplement it. *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 140; 796 NW2d 94 (2010). Defendant concedes that "There is nothing in the federal statute that expressly preempts state law, nor does the state law directly conflict with federal law." He contends, without citation to authority and without argument, that "it does appear that the Mann Act was intended to cover the entire field of interstate transportation."

The premise of defendant's argument is misplaced, however, because defendant's convictions were not based on transporting the women from Florida to Michigan for the purpose

[6] Thus, defendant's hypotheticals for both constitutional attacks are not relevant in this case.

[7] Defendant asserts that he could not be prosecuted under state law because a federal statute "appears . . . [to be intended] to cover the entire field of interstate transportation." Defendant also notes, however, that nothing in the federal statute expressly preempts state law and that the state law does not directly conflict with federal law. Defendant's unsupported argument is without merit.

of prostitution. Rather, defendant's convictions were based upon his transportation of the women for the purpose of prostitution into and within the state of Michigan. Although reference was made to their transportation from Florida to Michigan, the evidence focused on defendant's transportations of the women from hotel to hotel and to and from their "dates" within Michigan. Additionally, the language of ML 750.459 focuses on the transportation of females within the state of Michigan and not interstate transportation. Defendant is not entitled to relief based on a federal preemption argument.

Defendant argues next that the trial court erred in scoring Offense Variables (OV) 9 and 10. The Michigan Supreme Court has recently clarified the standards of review applicable to a sentencing guidelines scoring issue. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, ── Mich. ──; ── NW2d ── (Docket Nos. 144327 & 144979, decided July 29, 2013), slip op, p 6. "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.* at slip op p 7.

Defendant asserts that the trial court erred in scoring OV 9 and OV 10 at 10 points each because these offense variables relate to "victims" of a crime and there is no evidence that the women were victims (as opposed to collaborators). OV 9 addresses the number of victims. MCL 777.39(1). A trial court must assess 10 points if "there were two to nine victims who were placed in danger of physical injury or death." MCL 777.39(1)(c). OV 10 addresses the exploitation of a vulnerable victim. MCL 777.40(1). A trial court must assess 10 points for OV 10 if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). Defendant makes no specific argument with respect to the scoring of the offense variables but, rather, states only generally with respect to both variables that the women were not victims. He offers no facts or supporting authority in support of this contention. Thus, this argument is not properly presented. However, the record reveals that the women, who were ages 15 and 16 at the time, were both brought from Michigan to Florida under the assumption that they were going to meet defendant's family and then return to Florida. A preponderance of the evidence supports a finding that the women were victims.[8]

Defendant separately argues, with regard to OV 9 only, that the women were not placed "in danger of physical injury or death." MCL 777.39(1)(c). Even assuming that OV 9 was improperly scored, the subtraction of 10 points from defendant's OV score would still place him in OV level II. "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). Accordingly, any error in assessing ten points for OV 9 would not require resentencing.

Defendant raises a number of issues in his Standard 4 brief. First, defendant's claims regarding the sufficiency of the proofs establishing the date of the offense as alleged in the

[8] Additionally, the women were minors at the time, and their youth, together with removing them from their home state of Florida, would warrant the scoring of 10 points under OV 10.

information, as well as the jury instruction regarding the date of the offense, are without merit. The information alleged that the offense occurred on or about September 27, 2011, which is the date that defendant was arrested. Even if the testimony did not establish that defendant transported the women for purposes of prostitution on that date, an information is only required to specify the time of the offense "as near as may be." MCL 767.45(b). A variance as to the time of the offense is not fatal "unless time is of the essence of the offense." MCL 767.45(1)(b). When time is not an element of the offense, any allegation of the time of the commission of the offense . . . shall be sufficient to sustain proof of the charge at any time before or after the date or dates alleged." MCL 767.51. Accordingly, as a general rule, "a defendant is, 'at least within reasonable bounds, required to take notice that the prosecution may . . . offer proof of another date than that expressly alleged.'" *People v Smith*, 58 Mich App 76, 90; 227 NW2d 233 (1975).

Here, the evidence established that the women had been transported by for purposes of prostitution several times and were unable to provide specific times for their activities to authorities. The "on or about" language used in the information was sufficient to notify defendant of the charges and, as time was not an element of the offense, evidence concerning the crimes taking place before the alleged date was sufficient. Sufficient evidence was presented to support a finding that defendant transported the women for the purpose of prostitution at various times between the time when they arrived in Michigan in August 2011 and the date on the information of September 27, 2011. Additionally, with regard to the instruction regarding the offense, defense counsel expressed satisfaction with the jury instructions as given, thereby waiving this claim of instructional error. Accordingly, there is no error to review. *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011). Even if the issue was not waived, however, contrary to defendant's argument the instruction did not specify a specific date of offense.

Next, defendant argues that the trial court erred by failing to instruct the jury that conviction of any count required unanimous agreement of which specific acts out of the many alleged formed the basis of the count involving the two women involved in this case. However, defense counsel expressly declined to object to the instructions as read. A defendant raising an unpreserved claim of error must show a plain error that affected substantial rights. *Carines*, 460 Mich at 763.

Defendant cites *People v Yarger*, 193 Mich App 532; 485 NW2d 119 (1992), for the proposition that it is error requiring reversal for a trial court to allow a jury to find a defendant guilty of transporting a female for purposes of prostitution without requiring the jury to agree unanimously on specific acts of transportation for purposes of prostitution where various instances were alleged. However, bearing more directly on this case are the pronouncements of our Supreme Court in *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994):

> [A] specific unanimity instruction is not required in *all* cases in which more than one act is presented as evidence of the actus reus of a single criminal offense. The critical inquiry is whether either party has presented evidence that *materially* distinguishes any of the alleged multiple acts from the others. In other words, where materially identical evidence is presented with respect to each act, and there is no juror confusion, a general unanimity instruction will suffice. [*Cooks*, 446 Mich at 512-513.]

The Court in *Cooks* elaborated:

> [I]f alternative acts allegedly committed by defendant are presented by the state as evidence of the actus reus element of the charged offense, a general instruction to the jury that its decision must be unanimous will be adequate unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagreed about the factual basis of defendant's guilt. [*Cooks*, 446 Mich at 524.]

The Court noted that *Yarger* and related cases concerned "a separate defense or . . . materially distinct evidence of impeaching regarding any particular act," *Cooks*, *supra* at 528, concluding that where the sole task for the jury is to determine the credibility of the victim concerning allegations of a single course of conduct, the factual basis for specific unanimity instruction required by *Yarger* and related cases does not exist. *Cooks*, *supra* at 528-529.

The present case is more akin to *Cooks* than to *Yarger*. Although the complaining witnesses were not able to offer much specificity concerning the times of specific acts of prostitution, each described a pattern that may fairly be characterized as a single course of conduct. Further, the defense maintained a posture of flat denial (that the victims were not in fact victims but corroborators). This position brings to bear no materially separate theories of defense. For these reasons, the lack of a special unanimity instruction in this case did not constitute plain error affecting substantial rights. *Carines*, 460 Mich at 774.

Defendant also argues that the trial court erroneously instructed the jury on the offense of transporting a female for prostitution and with regard to the cautionary accomplice witness instruction. Defendant waived this issue as a result of defense counsel affirmatively expressing satisfaction with the jury instructions. *People v Chapo*, 283 Mich App 360, 373-374; 770 NW2d 68 (2009). Defendant's waiver extinguished any error for appellate review. See *People v Loper*, 299 Mich App 451; 830 NW2d 836 (2013). At a minimum, defendant failed to preserve this issue by raising it in the trial court. See *People v Gratsch*, 299 Mich App 604, 615; 831 NW2d 462 (2013).

Defendant first argues that that the court's jury instruction regarding the elements of MCL 750.459 was erroneous it "misnamed the statute" because the court's name for the statute – "prostitution, transporting a female" – was misleading because it suggested that defendant was being charged with prostitution, rather than transporting for the purpose of prostitution. This argument is misplaced as the court explained that the prosecutor must prove that defendant "knowingly transported or caused to be transported or aided and assisted in transporting a female with the intent to assist her in engaging in the practice of prostitution." Defendant also takes issue with the court's instruction that defendant must have intended to "assist" the female in engaging in prostitution, arguing that this is different from assisting in the transportation for the purpose of prostitution. Defendant identifies the distinction as subtle, and presents a confusing argument with regard to why the instruction was erroneous. Nonetheless, a review of the trial court's instruction as a whole does not reveal error affecting defendant's substantial rights as the instruction does not allow the jury to convict defendant solely for assisting the female in prostitution.

Defendant further argues that the trial court's cautionary instruction regarding accomplice testimony was erroneous. The court instructed the jury in conformity with CIJ2d 2.6 and called the jury's attention to the possible bias of the women involved in this case and instructed the jury to use caution when assessing the credibility of the two main witnesses against defendant. Defendant fails to show how the instruction to use caution when assessing the credibility of the witnesses constituted plain error that affected defendant's substantial rights.[9]

Defendant also argues that he was denied a fair trial by prosecutorial misconduct. Defendant did not preserve his claims of prosecutorial misconduct by appropriate objections in the trial court. Accordingly, we review these claims for plain error affecting defendant's substantial rights. *People v Pfaffle*, 246 Mich 282, 288; 632 NW2d 162 (2001).

Defendant claims that the prosecutor committed misconduct by revealing through questioning of witness Bulkowski that she had been given a plea deal whereby her felony charge of retail fraud would be dropped in exchange for her truthful testimony against defendant. He contends that the reference to the plea deal that contained a promise of truthfulness conveyed a message to the jury that the prosecutor had some special knowledge that any testimony the witness provides will be truthful. This assertion was discounted in *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995). The questioning was proper and did not convey to the jury that the prosecutor had some special knowledge or facts indicating the witness' truthfulness. See, e.g., *People v Williams*, 123 Mich App 752, 755-756; 333 NW2d 577 (1983). Defendant has failed to demonstrate plain error affecting his substantial rights.

Defendant also argues that the prosecutor denigrated defense counsel during closing rebuttal arguments when he said that "They're just trying – trying to get him out. Trying to – you know – split the eye of the needle." He contends, without any argument but with citation to general authority, that this comment suggested that defense counsel was deliberately attempting to mislead the jury. However, a review of the record in context reveals that the prosecutor's statement was actually:

> They're just trying to get him out. Trying to – you know – split the eye of the needle, (sic) to say well, I was transporting, but it wasn't for prostitution. It was just being a kind guy.
>
> No, that's not the case. He was transporting. This whole thing – this whole scheme thought up by him, transporting these girls for the purpose of prostitution.

A prosecutor's comments must be considered in light of defense arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). During closing argument defense counsel argued that "the movements and the transporting and the moving from one place to another is completely innocent. It's – there's nothing wrong with when you have your friends with you and you're taking care of them, to provide shelter for them. To go there with them."

[9] In fact, it would likely have been error for the trial court not to provide the instruction on accomplice testimony.

The prosecutor's comment on rebuttal was in direct response to defense counsel's argument and, as such, was not prosecutorial misconduct.[10]

Lastly, defendant argues that he was denied the effective assistance of counsel as a result of the errors discussed in the issues above. However, because no errors occurred as discussed above, any objections would have been futile, and defense counsel is not ineffective for failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).[11]

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering

[10] Defendant's final argument regarding uncharged acts has already been addressed in Issue I of defendant's Standard 4 brief and is without merit.

[11] Defendant's argument that MCL 750.459 violates the Commerce Clause of the United States Constitution presents the same argument made by defendant in his original brief on appeal with regard to the transportation of the women and need not be reexamined as this case involved the transportation of females within the state of Michigan and not in interstate commerce.